No. 73-1054

In the Supreme Court of the United States

OCTOBER TERM, 1973

ANDREW RAYMOND, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

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The issue is whether the government showed that five or more persons conducted the gambling business, as required to establish a violation of 18 U.S.C. 1955.

Following a jury trial in the United States District Court for the Northern District of Indiana, petitioners were convicted of conducting a gambling operation in violation of 18 U.S.C. 1955. Petitioners Raymond and Alexander were sentenced to one year's imprisonment. Petitioners Covitz and Ladella were sentenced to three years' imprisonment, of which the court ordered six months served and the remainder suspended. Covitz and Ladella were also ordered to serve five years' probation following their six months' imprisonment. The court of appeals affirmed (Pet. App. A).

Petitioners contend that since 18 U.S.C. 1955 prohibits only those gambling businesses which "involve five or

more persons who conduct, finance, manage, supervise, direct or own all or part of such business," the verdict of guilty as to only four of the six co-defendants was fatally inconsistent. The Act, however, does not require as one of its essential elements that a jury convict five persons, but only that it find that five persons engaged in the conduct of the business. See, *e.g., United States* v. *Riehl,* 460 F. 2d 454 (C.A. 3); *United States* v. *Ceraso,* 467 F. 2d 653 (C.A. 3). Congress intended to exclude only bettors from computation of those who may be members of the illegal gambling business, and the term "conduct" was intended to mean "any participation in the operation of a gambling business." *United States* v. *Ceraso, supra.* See also *United States* v. *Becker,* 461 F. 2d 230, 232 (C.A. 2); *United States* v. *Riehl, supra; United States* v. *Harris,* 460 F. 2d 1041 (C.A. 5), certiorari denied, 409 U.S. 877.[1] Runners, telephone clerks, salesmen, and watchmen may thus be counted among the required five persons. *United States* v. *Hunter,* 478 F. 2d 1019 (C.A. 7). See *United States* v. *Harris, supra,* where dealers as well as doormen were specifically held to be persons who conduct an illegal gambling business.

Here, one witness testified that he himself had been a dealer in the gambling activity, a Barbut game,[2] for a

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[1]The legislative history of Section 1955 shows that:

> The term "conducts" refers both to high level bosses and street level employees. It does not include the player in an illegal game of chance, nor the person who participates in an illegal gambling activity by placing a bet. [H. Rep. No. 91-1549, 91st Cong., 2d Sess. 52-53.]

[2]Barbut is a dice game. There are two croupiers or dealers who must be at the table at all times. At the start of the game, one of the dealers designates two players to be dice throwers; they are labeled number one and number two. Before the dice are thrown, the remaining players in the game wager on one or the other of the two dice throwers. The players actually bet against one another—not the house. The house makes its profit by taking a percentage from each pot (Tr. 98-111).

number of weeks; and a defense witness testified that he and a friend of his had acted as dealers in the game and that the dealers got tips (Tr. 522-523, 534-535). Another witness testified that the operation of the gambling activity involved a boss or supervisor who gave the orders (Raymond), two dealers, two relief dealers, and a doorman (not to mention the girl serving the coffee), and the fact that such persons participated in these roles was corroborated by still another witness. From this evidence, it was reasonable for the jury to have concluded that, even excluding the two acquitted defendants, the business required and indeed involved at least five persons. The court of appeals correctly concluded that this was evidently what the jury did. Since the jurors were informed that the participation of five persons was an essential element of the crime, there was no need to instruct them also that the five persons might include individuals not named in the indictment.

Additionally, various eyewitnesses testified that the unconvicted co-defendants had participated in the business as doormen (see, *e.g.*, Tr. 114, 120-121, 328, 380) and that one of them also acted as a dealer (see, *e.g.*, Tr. 114, 120, 333, 378, 397, 429). Therefore the jury could have found that although those two co-defendants lacked the requisite criminal intent,[3] they still participated in the gambling activities under 18 U.S.C. 1955(b)(1)(ii).

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[3]The judge in the instant case instructed the jury that each defendant must have the requisite intent and that, while every person need not do every criminal act, he may be found guilty if his participation was willful, which was defined as voluntary and intentional with the specific intent to do something the law forbids, that is, with a purpose to disobey or disregard the law (Tr. 632-635).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

APRIL 1974.